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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

DONALD SPARKS,
Petitioner

vs.

ALABAMA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, DONALD SPARKS, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the judgment of the Court of Criminal Appeals of Alabama rendered on the 15th of September, 1970, which judgment affirmed the conviction of DONALD SPARKS for the crime of robbery in the Circuit Court of DeKalb County, Alabama.

A timely application for rehearing in the Court of Criminal Appeals of Alabama was denied, without opinion, on the 17th of November, 1970.

A timely application for a writ of certiorari was filed in the Supreme Court of Alabama and denied, without opinion, on the 17th of December, 1970.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Alabama has been reported at 242 So2d 403, *cert. den.* 242 So2d 408, and is attached hereto in Appendix A, *infra*, pp. A1 thru A7.

JURISDICTION

The judgment of the Court of Criminal Appeals of Alabama was entered on the 15th of September, 1970, and is

annexed hereto in Appendix A, *infra*, p. A8.

A timely petition for rehearing was denied on the 17th of November, 1970, and the judgment of the Court of Criminal Appeals of Alabama thereon is in Appendix A, *infra*, p. A9.

A petition for writ of certiorari timely filed in the Supreme Court of Alabama was denied on the 17th day of December, 1970, and the order thereon is in Appendix A, *infra*, p. A10.

The statutory provision believed to confer jurisdiction upon this Court to review the judgment of the Court of Criminal Appeals of Alabama rendered the 15th of September, 1970, is 28 U.S.C. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

I.

Whether or not Alabama denied to petitioner SPARKS the right to compulsory process for compelling the attendance of two witnesses subpoenaed by him, such right being guaranteed by the Sixth Amendment, United States Constitution, as the same is made applicable to Alabama by operation of the Fourteenth Amendment, United States Constitution, where Alabama made little or no showing that a diligent effort, or any effort, was made by the Sheriff's department, DeKalb County, Alabama, to serve the requested subpoenas upon these witnesses.

II.

A subsidiary, and necessarily included question, is whether or not Alabama denied petitioner SPARKS Fourteenth Amendment, United States Constitution, due process by the refusal of a requested continuance predicated upon the absence of these two witnesses.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

I.

Constitution of the United States, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the

right *** to have compulsory process for obtaining witnesses in his favor,***

II.

Constitution of the United States, Amendment XIV, Section 1:

Section 1. ***nor shall any state deprive any person of life, liberty, or property, without due process of law;***

III.

Title 28, Section 1257(3), United States Code:

Final Judgments or Decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari, ***where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, ***the United States.

STATEMENT OF THE CASE

Petitioner SPARKS was proceeded against in the Circuit Court of DeKalb County, Alabama, for the criminal offense of robbery, such robbery having occurred allegedly on the 27th of June, 1966.

The salient and pertinent facts to support the indictment produced on the trial of this cause from the 28th of August, 1968, through the 31st of August, 1968, are delineated in the opinion of the Court of Criminal Appeals of Alabama, and, in the interest of conserving time and space, shall not be repeated at this point. The attention of the Court is respectfully invited to Appendix A, *infra,* pp. A1 thru A3 , since this opinion fairly presents the basic factors involved in the trial.

Of particular import here, however, and especially in connection with the questions for which review is sought, the proceedings concerning the missing two witnesses must be presented at greater length.

Prior to the commencement of the presentation of the evidence on the case in chief for Alabama, but after the selection of the jury, petitioner moved for a continuance because of the absence of two witnesses: William K. Knight and

Ida Bell Wilson Stacey. Evidence was adduced in support of this motion.

Sheriff Harold Richards, of DeKalb County, testified, on examination by Alabama, that he made an effort to locate William K. Knight; that he did not find him; that he heard that he was in Florida; that he was not around Ft. Payne, DeKalb County, Alabama, that he knew of.

On cross-examination, Sheriff Richards stated there was no address for Knight; he was then shown a certified copy of an application for an automobile tag which listed an address for Knight as 1909 South Gault Avenue, Ft. Payne, Alabama; Sheriff Richards did not go to that address; G. H. Noles lived there at the time the tag was bought; Richards did not go to that address to see if Knight was there so he could be served.

The tag application was introduced into evidence in support of the motion of SPARKS for a continuance.

Curtis Davis, clerk of the police force of Ft. Payne, Alabama, was called as a witness for SPARKS. Davis stated he had a record of one Tom Walston being arrested for driving while intoxicated on the 17th of May, 1968, at 11:48 o'clock, P.M. He was released, leaving an automobile as bond collateral. Later, Walston picked up the car; no other collateral was left; the bond was forfeited on the 28th of May, 1968.

Sheriff Richards was recalled and testified that he saw Walston after he was brought in on this occasion. Ida Bell Wilson Stacey was with Walston; this was probably in July when Walston signed a waiver of extradition; apparently there had been a request that Ida Bell Wilson Stacey be placed under bond in this case; the Sheriff knew nothing about this hearing on the 20th of May, 1968; the Sheriff saw Walston in July, 1968, and Ida Bell Wilson Stacey was with him.

Davis Keen, a police sergeant of Ft. Payne, Alabama, stated he arrested Walston on the 17th of May, 1968, and Ida Bell Wilson Stacey was with him.

Carrel Ivey, Clerk, Circuit Court, DeKalb County, Alabama, was recalled as a witness and testified he did not recall when the subpoena for Ida Bell Wilson Stacey was requested, but it was issued on the 17th of May, 1968; the subpoena for the present term of court was issued on the 6th of August, 1968; the term of court for the criminal docket of

DeKalb County was set on or about the 6th of August, 1968; a subpoena for Ida Bell Wilson Stacey was issued on the 26th of July, 1968, and that was the approximate date court was set, *i.e.*, when it became known that a term of court would be held in August, 1968, for the criminal docket.

Evelyn Keith, a sister of Ida Bell Wilson Stacey, stated she last saw her sister about three weeks before when Ida Bell came to her house on the top of Lookout Mountain; this was some time after the first of August, 1968; she was with Tom Walston, and stayed about an hour; she had seen Ida Bell several times prior to this, about 3 or 4 times between the 17th of May, 1968, and the 1st of August, 1968; she was in DeKalb County; Ida Bell left her house about 3 weeks previous, presumably going to Florida.

Counsel for SPARKS then stated to the trial court:

> "MR. BEATY: ***We ask for a continuance due to the fact that we don't have these witnesses here, William K. Knight, who was involved in the robbery here, and Mrs. Wilson, who has been acknowledged by the prosecuting witness to have been in the house at the time the robbery occurred. She has been here in the jurisdiction of the Court after our subpoena was requested and after it was issued by the Clerk."
>
> "THE COURT: I overrule your motion."
>
> "MR. BEATY: We except."

Subsequently during the progress of the trial, petitioner SPARKS attempted to introduce into evidence a tape recording of a statement by Ida Bell Wilson Stacey, to which Alabama objected on the ground, among others, that it was not shown that a deposition of the witness could not have been taken.

Petitioner SPARKS answered the objection on the grounds, among others, that:

> "***On the day of the mistrial on account of the illness of a juror the defendant immediately requested the Court, and the request was granted, to get a subpoena for the next term of Court, and requested the Court to put the witness under bond, and since that time this same witness has been back in Fort Payne since the May term of Court, and the subpoena has not one time been served on her. *We*

> *say that we have been denied due process of law in subpoenaing our witness.* Another subpoena was issued on the 26th of July and since that time this witness has been home and that she has been seen here four times." *(Emphasis supplied).*

The trial court sustained the objection of Alabama to the introduction into evidence of the tape recording. An exception was duly taken.

Then exhibits were offered for petitioner SPARKS as showings for William K. Knight and Ida Bell Wilson Stacey, to which objections were sustained.

The showing for William K. Knight, an avowed participant in the alleged robbery, exculpated petitioner SPARKS.

The showing for Ida Bell Wilson Stacey did likewise.

The Court of Criminal Appeals of Alabama correctly noted in its opinion that petitioner SPARKS argued the constitutional issue involving compulsory process for the attendance of witnesses in brief, and, it might be noted, this was a federal constitutional argument.

The Court of Criminal Appeals, of course, decided this issue. Hence, it is submitted the federal constitutional question was raised at the first opportunity in the trial court; the issue was briefed on appeal; and the matter was adjudicated adversely to the petitioner SPARKS on federal constitutional grounds.

There is a properly presented federal constitutional issue before this Court.

REASONS FOR GRANTING THE WRIT

The right of a defendant in a criminal case under the Sixth Amendment to have compulsory process for obtaining witnesses in his favor is made applicable to the States through the Fourteenth Amendment, since the right is so fundamental and essential to a fair trial. *Washington v. Texas,* 388 US 14 (1967).

Since this pronouncement by this Court there has not been a decision which has delineated the duties and responsibilities of a State in affording to a criminal defendant the implementation of this Sixth Amendment right.

Many States, but not Alabama, have approached the problem of witnesses outside the jurisdiction through enactment of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. See, *e.g., Oregon v. Blount,* 200 Or 35, 264 P2d 419, 44 ALR2d 711 (1953), wherein such a statute was construed as not permitting a court to order payment by the state of mileage and other fees.

The case on the question that still is the law apparently is *Minder v. Georgia,* 183 US 559 (1902). In *Minder* there was a refusal to continue because of out-of-state witnesses. This Court *held* there was not a denial of due process because it was not within the power of a state court to compel the attendance of witnesses beyond the limits of the state. This Court further stated that due process was not denied because there was no provision in state law for out-of-state depositions.

As mentioned in the opinion of the Court of Criminal Appeals, Alabama does have a statute which permits a defendant in a criminal case to take a deposition of a witness who is out-of-state.

Also, attachment of a recalcitrant witness is mentioned by the Court of Criminal Appeals. But a close reading of the opinion indicates this comes into operation only when the witness has actually been served with a subpoena requiring his attendance upon the trial court.

Petitioner SPARKS is also aware of *Lisenba v. California,* 319 US 219 (1941), wherein this Court ruled that a continuance was not required to meet Fourteenth Amendment due process requirements merely to answer the contentions of the prosecution, and that this Court would not inquire into whether the California court abused its discretion in so denying a continuance.

Notwithstanding such holdings, particularly since the judicial gloss on the Sixth Amendment was not read into the Fourteenth Amendment due process clause under which *Lisenba and Minder* were decided, petitioner SPARKS would remark that the primary thrust of his petition, as noted, concerns the duties and responsibilities of Alabama in affording him compulsory process.

SPARKS submits that constitutionally when a subpoena has been requested, as it was in this case, then a State must exert more than a minimum of effort to serve that subpoena upon the witness. Furthermore, it is the position of SPARKS

that once the question has been raised about service of the subpoena that it becomes incumbent upon a State to demonstrate it has actually made a serious attempt to effectuate service.

The record is clear that subpoenas were requested and, in fact, issued in this case. Apparently, no effort was made to serve the two witnesses at available addresses. The Sheriff had merely heard they were out of the state, or not otherwise amenable to service of process. Petitioner SPARKS had sought bond for the witness Ida Bell Wilson Stacey. SPARKS did everything available to him to secure the presence of these witnesses.

It is submitted Alabama failed in its duty to furnish compulsory process! Petitioner further submits Alabama did not make a sufficient showing as to why the subpoenas were not served.

In this posture of the matter, then SPARKS cannot be faulted for not utilizing statutory out-of-state deposition procedures. An adequate showing by name of what such witnesses would testify to was offered, but refused. Compare *Lisenba, supra.* This testimony, if believed by the jury, would have been more than adequate for an acquittal since the showing caterogically denied that SPARKS was a participant in the robbery alleged in the indictment.

CONCLUSION

The questions presented are deemed to be ones which have not been considered by this Court, particularly in the light of *Washington v. Texas, supra.*

Petitioner SPARKS submits because the questions do involve highly important facets of Sixth Amendment interpretation this Court should issue the writ of certiorari so that these questions may be fully briefed, argued, and decided.

Respectfully submitted,

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March, 1971

Counsel for Petitioner

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1969-70

7 Div. 9

Donald Sparks

v.

State

Appeal from DeKalb Circuit Court

PRICE, PRESIDING JUDGE

Appellant, Donald Sparks, stands convicted for the offense of robbery, with a penitentiary sentence of ten years.

The evidence tends to show that three armed men, with scarves covering their faces, entered the home of Wendell West, in Fort Payne, Alabama, around eleven o'clock p.m., June 27, 1966. They handcuffed and bound Mrs. Cleo West and Mrs. Wilson, a woman companion, and removed the keys to Mrs. West's Dodge Dart automobile from her purse. When Mr. West came home about one o'clock two men, each holding a gun to his head, took $334.00 from his pocket. Mr. West was then taken into the bathroom and immersed in a bathtub full of water in an effort to force him to reveal the whereabouts of his money. During the scuffle in the bathroom defendant's scarf dropped and Mr. West saw defendant's face. Mr. West was taken into the room where his wife and Mrs. Wilson were. He was handcuffed and his eyes were taped. Defendant took the keys to Mr. West's office and left with one of the men, later identified as William K. Knight. The third man remained at the house for about an hour and a half, until someone came and called to him and he left.

Officers Kean and Shirley, Fort Payne policemen, stopped the West's Dodge Dart on a Fort Payne street during the early

morning hours of June 28th. Defendant was driving the car. Knight was riding as a passenger. Neither of them could produce identification or driver's license. There were two pistols and a carbine in the car. Three cars were driven to the police station. Officers Kean and Shirley in the lead car and Sergeant Pack, a Fort Payne policeman in the police car behind the Dodge Dart driven by the defendant. Upon reaching the police station, the defendant got out and walked over to the side of Sergeant Pack's car and talked with him through the window. Defendant then ran back to the West car and drove away. The car was found abandoned some two or three hours later.

Sergeant Pack was also indicted for the robbery of Wendell West. He testified he had never seen defendant prior to the trial. He testified Mr. Clyde Traylor, representing the State, had promised him a "clean bill of health" if he would identify the defendant, Donald Sparks, as the driver of the West automobile.

Donald Sparks testified as a witness in his own behalf that he was not in Fort Payne on the evening of June 27, 1966, or the early morning of June 28; that he was in Sapulpa, Oklahoma; that he had never entered the West home or driven the Dodge Dart.

The defendant sought to establish an alibi through the testimony of Mr. Jesse Henson, owner and manager of a motel in Sapulpa, who testified Donald Sparks was registered in his motel from June 26 to June 29, 1966. He identified defendant as the person who registered and that he was present on each of the three nights.

Mr. Clyde Traylor, for the State in rebuttal, stated he had never made a promise to Sergeant Pack pertaining to Pack's identification of defendant.

The testimony presented questions for the jury's determination and was sufficient to sustain the verdict. There was no error in the court's refusal of the requested general affirmative charge nor in the denial of the motion for a new trial.

Counsel for appellant filed motion to quash the indictment on the ground there was no legal evidence before the grand jury to authorize the finding of an indictment.

The burden of proving the indictment was returned without legal evidence before the grand jury rested upon defendant. *Gore v. State*, 22 Ala. App. 136, 114 So. 791; *Sparrenberger v. State*, 53 Ala. 481; *Franklin v. State*, 233 Ala. 203, 171 So. 245.

No proof was presented to support the allegation that there was no legal evidence before the grand jury. The defendant failed to meet the burden placed upon him. The motion to quash was properly denied.

The defendant filed motion to require the state to produce testimony presented to the grand jury which returned the indictment. The motion was overruled. The judgment entry recites that the testimony taken on this motion shows conclusively that the testimony before the grand jury was not preserved in writing. *Adams v. State*, 33 Ala. App. 136, 31 So. 2d 99, holds that if the state uses part of the transcribed notes of the testimony before the grand jury, the defendant is entitled to inspect all of such testimony.

In *Bailey v. State*, 24 Ala. App. 339, 135 So. 407, the court said the trial judge will not be put in error for refusing to order production of grand jury notes where they were used by the prosecutor merely to formulate questions and were not offered in evidence by the state. See also the article by Hon. L. Drew Redden, published in 22 Alabama Lawyer at p. 115 (April, 1961).

Without deciding that a defendant is entitled to be furnished with the testimony taken before the grand jury, (See *Sanders v. State*, 278 Ala. 453, 179 So. 2d 35) we simply hold that in this case the motion was properly denied, since the judgment entry shows the testimony before the grand jury was not available.

Appellant contends the trial court erred in putting him to trial over objection when three jurors, properly summoned, failed to appear.

The judgment entry shows that the jury list served upon the defendant from which to select a jury consisted of eighty jurors regularly drawn for jury duty and twenty special jurors properly drawn, consisting of venire of one hundred jurors. A hearing was had on the motion. The sheriff testified he was unable to locate one of the jurors inquired about. The trial judge stated he had not excused either of the three jurors. There was

no error in the court's ruling. *Nolen v. State*, 35 Ala. App. 249, 45 So. 2d 786; Title 30, §§ 63 and 67, Code of Alabama 1940.

The clerk entered opposite each name on the jury list the occupation and place of residence of such person. The provisions of Title 30, § 30, Code, supra, as to the listing the place of business of each person are directory only, and the failure to list the place of business is not a ground for granting a motion to quash the venire, § 45, Title 30, Code, supra; *Childers v. State*, 122 Ala. 22, 26 So. 162; *White v. State*, 136 Ala. 58, 34 So. 177. There was no showing of fraud. *Cook v. State*, 134 Ala. 137, 32 So. 696; *White v. State*, supra.

Defendant's motion for a continuance because of the absence of the witnesses William K. Knight, alleged to have been a participant in the robbery, and Ida Bell Wilson, the woman who was with Mrs. West at the time of the robbery, was denied.

The motion for a continuance was addressed to the sound discretion of the trial court, whose action is not reviewable unless gross abuse is shown. Denial of continuance is not a palpable abuse of discretion in the absence of a showing as to what the witness would testify. *Brand v. State*, 13 Ala. App. 390, 69 So. 379; *Hudson v. State*, 217 Ala. 479, 116 So. 800. No showing as to what the absent witnesses would swear was introduced in support of the motion. We find no abuse of discretion.

Counsel argues in brief that defendant was deprived of his constitutional right to compulsory process for the attendance of witnesses. It was shown that ordinary compulsory process of subpoena had been issued for these witnesses, but that Knight was not found, and at the time of trial Mrs. Wilson was in Florida.

In *Childress v. State*, 86 Ala. 77, the court said:

> "Extraordinary compulsory process, such as attachment, is not resorted to, until the witness has placed himself in contempt, and the propriety and the necessity of the process is shown. The court is not bound to order an attachment, ex mero motu, on the failure of a witness to appear in answer to the subpoena. It is not shown that the defendant asked for an attachment, or other compulsory process."

It is not shown that the defendant asked for an attachment or that the witnesses were within the jurisdiction of the court. *Forrester v. State*, 41 Ala. App. 654, 148 So. 2d 251; *Jarvis v. State*, 220 Ala. 501, 126 So. 127. See also *Powell v. State*, 39 Ala. App. 246, 100 So. 2d 38, cert. den. 267 Ala. 100, 100 So. 2d 46.

After the state had rested its case in chief and during the examination of defendant's witnesses he sought to introduce magnetic tape recordings of statements allegedly made by Ida Bell Wilson and written statements of absent witnesses Ida Bell Wilson and William K. Knight. The tapes were offered "for the purpose of impeaching the witnesses Kean and Mrs. West and Mr. West and Shirley." The State's objection to the introduction of these statements was sustained.

Our statute, Title 15, §§ 297, 298, Code 1940, provides that a defendant in a criminal case may take the deposition of any witness who is unavailable to testify for any of the reasons set out therein. Also, it is an established rule that the testimony of a witness on a former trial may be introduced on a subsequent trial where the witness is inaccessible, provided certain conditions are found to exist and the fundamental requirements for the admission of such testimony are met. *Welldon v. Roberts*, 37 Ala. App. 1, 67 So. 2d 69, affirmed, 259 Ala. 517, 67 So. 2d 75; 31 A. C.J.S. Evidence, Chapter 1X, ps. 944, 978.

There was no contention that the tapes and statements came within the requirements of the rule. No foundation or predicate was laid to assure the authenticity of the offered exhibits. They were inadmissible as hearsay and the court properly excluded them.

Officer David Kean testified that around 1:30 the night of the robbery he and officer Shirley stopped the West automobile, driven by the defendant, in front of Rupil's restaurant; that they were in front of the restaurant for fifteen or twenty minutes during which time they searched the two men in the car. He described the clothes worn by the men and the physical appearance of Mr. Sparks, his weight, color of his eyes and hair. He was then shown photographs of the area where the car was stopped. The State's objection to the admission of defendant's Exhibit 7, a night photograph of the location, was sustained. The witness stated the photograph did not correctly depict the lighting conditions as they appeared at the time of the arrest. The photograph was properly excluded. *Vandiver v. State* 37 Ala. App. 526, 73 So. 2d 566; *Henry v.*

State, 277 Ala. 247, 168 So. 2d 617.

The record discloses the jury retired to consider its verdict at 1:40 p.m., on Friday, August 30th. At 5:30 they were brought before the court and sent to supper. After supper they deliberated until 8:00 o'clock when they were sent to their rooms for the night.

The judge who tried the case resided in another county in the circuit. On Saturday morning the jury returned to the courtroom and reported they could not reach a verdict. A circuit judge residing in the county of trial, who evidently had agreed to accept the verdict, charged the jury as to its duty to reach a verdict, if possible, and sent the jury to its room for further deliberation. No exception was reserved to the court's instruction and nothing is presented for our review.

One of the grounds of motion for a new trial was that the defendant was denied a fair and impartial trial, for that the jury "sought to leave the jury room and report to the court at 9:45 o'clock A.M., on the 31st day of August, 1968, but was denied by the bailiff of said court, and informed that a judge was not available for them to report to, and that the jury was refused every attempt to return without unanimous agreement of conviction, and on a weekend when one or more of the jurors had a pressing engagement."

Mr. Stowe, a juror, testified at the hearing on the motion for new trial that on Saturday morning he knocked on the jury room door and informed the bailiff the jury could not agree. The bailiff told him the "Judge said try it a little longer." He stated on cross examination that the fact that he had planned a trip for the week-end did not influence his verdict.

Juror Caldwell stated he did not recall that the bailiff refused to let the jury come out or that he told them to deliberate longer.

Mrs. Inez Robertson, a juror, testified she remembered the occasion on Saturday morning when the bailiff told the jury to deliberate a little longer.

Mr. Ballenger, a juror, testified the verdict was returned about 2:00 p.m. At about 9:45 a.m. the jury attempted to inform the court they were deadlocked, but the bailiff told them the judge said for them to go back and deliberate further.

Mr. Walter Lybrand, called as a witness by the defendant, testified he served as bailiff in this case. He remembered that on Saturday morning one of the jurors wanted to talk to the judge. He did not remember telling the jury the judge said to go back and deliberate further. "I told them they would have to come in before the Judge." In reply to the question by defense attorney the witness stated he did not telephone the judge to find out what time he was coming or to tell him the jury "wanted to come out." The inference to be drawn from this testimony is that the judge had not reached the courthouse when the jury made its request, and there was not an arbitrary refusal of such request by the bailiff. We are of opinion the court did not err in denying defendant's motion for a new trail on the ground of the alleged misconduct of the bailiff.

The judgment is due to be and hereby is affirmed.

AFFIRMED.

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEAL

OCTOBER TERM, 1969-70

7 Div. 9

Donald Sparks

v.

State

Appeal from DeKalb Circuit Court

(JUDGMENT)

September 15, 1970

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the Appellant pay the costs of appeal of this court and of the Circuit Court.

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1970-71

7 Div. 9

Donald Sparks

v.

State

Appeal from DeKalb Circuit Court

November 17, 1970

Judgment of affirmance having been rendered on September 15, 1970, and timely application for rehearing having been filed by appellant on September 29, 1970, it is the order and judgment of this court that the application for rehearing be and the same is hereby overruled.

THE SUPREME COURT OF ALABAMA

THURSDAY, DECEMBER 17, 1970

THE COURT MET PURSUANT TO ADJOURNMENT

PRESENT: ASSOCIATE JUSTICES LAWSON, SIMPSON, MERRILL, COLEMAN, HARWOOD, BLOODWORTH, MADDOX and McCALL

CHIEF JUSTICE LIVINGSTON, NOT SITTING

7th Div. 889

Ex parte: Donald Sparks, Petitioner
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Donald Sparks v. State of Alabama)

(DeKalb Circuit Court)

Comes the petitioner, and the Petition for Writ of Certiorari to the Court of Criminal Appeals being submitted on briefs and duly examined and understood by the Court,

IT IS CONSIDERED AND ORDERED that the Writ be, and the same is hereby, denied and that the Petition be, and the same is hereby, dismissed at the costs of the petitioner, for which costs let execution issue.

(No Opinion)

(Simpson, Coleman, Bloodworth, Maddox and McCall, JJ., concur.)

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MAR 29 1971
E. ROBERT SEAVER, CLER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1462

DONALD SPARKS,
PETITIONER

versus

STATE OF ALABAMA
RESPONDENT

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA AND APPENDICIES

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OCTOBER TERM, 1970

NO.———

DONALD SPARKS,

PETITIONER

versus

STATE OF ALABAMA

RESPONDENT

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIEF AND ARGUMENT FOR RESPONDENT

I

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Criminal Appeals of Alabama is reported as follows:

Donald Sparks v. State of Alabama, 46 Ala. App.——— 242 So. 2d 403 (1970)

The Supreme Court of Alabama denied certiorari and this order is reported as follows:

Donald Sparks v. State of Alabama, Ex Parte Donald Sparks, 286 Ala.———, 242 So. 2d 408 (1970)

II

JURISDICTION

The petitioner has applied to this Honorable Court for a writ of certiorari to review the judgment of the Court of Criminal Appeals of Alabama which was rendered on September 15, 1970. A petition to the Supreme Court of Alabama for a writ of certiorari was denied on December 17, 1970.

Petitioner applies for this writ of certiorari under the provisions of 28 U.S.C. 1257(3).

III

QUESTION PRESENTED FOR REVIEW

Does a state deprive a criminal defendant of due process of law by failing to compel the attendance of witness for said defendant at his trial, when those witnesses are beyond the jurisdiction of said state?

IV

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth and Fourteenth Amendments to the Constitution of the United States.

V

STATEMENT OF THE CASE

Petitioner was indicted for robbery by the Grand Jury of DeKalb County at the July Term 1966 (R. p. 1). In open court and represented by his attorneys, the petitioner was ar-

raigned on May 6, 1968, and entered a plea of not guilty (R. pp. 232-233). Petitioner's motion to quash the indictment was denied (R. p. 233), and cause was set for trial May 20, 1968.

Petitioner's motion for discontinuance was overruled on May 20, 1968, as was a subsequent motion for continuance (R. p. 233). The illness of the juror resulted in a mistrial.

In open court, and represented by his attorneys, petitioner was rearraigned on July 23, 1968, and entered a plea of not guilty (R. p. 234). The cause was reset for trial for August 26, 1968. A jury was struck and empaneled on August 28, 1968.

At this point in the proceedings petitioner moved for a continuance on the ground that two of his witnesses were absent from court. From the testimony on this motion it was apparent that the witnesses had not been served with subpoena because they were outside of the State of Alabama. It also appeared that the Sheriff of DeKalb County had not been informed of the location of these witnesses. No showing was made of what these witnesses would testify. There was no indication that they would be available later (R. pp. 50-59). Later during the trial in chief there was an attempt to introduce tape recorded statements by these witnesses, but these were rejected as hearsay (R. pp. 142-147).

The evidence was presented to the jury and the tendencies of this evidence were outlined by the Court of Criminal Appeals of Alabama as follows:

> "The evidence tends to show that three armed men, with scarves covering their faces, entered the home of Wendell West, in Fort Payne, Alabama, around eleven

o'clock p. m., June 27, 1966. They handcuffed and bound Mrs. Cleo West and Mrs. Wilson, a woman companion, and removed the keys to Mrs. West's Dodge Dart automobile from her purse. When Mr. West came home about one o'clock two men, each holding a gun to his head, took $344.00 from his pocket. Mr. West was then taken into the bathroom and immersed in a bathtub full of water in an effort to to force him to reveal the whereabouts of his money. During the scuffle in the bathroom defendant's scarf dropped and Mr. West saw defendant's face. Mr. West was taken into the room where his wife and Mrs. Wilson were. He was handcuffed and his eyes were taped. Defendant took the keys to Mr. West's office and left with one of the men, later identified as William K. Knight. The third man remained at the house for about an hour and a half, until someone came and called to him and he left.

"Officers Kean and Shirley, Fort Payne policemen, stopped the West's Dodge Dart on a Fort Payne street during the early morning hours of June 28th. Defendant was driving the car. Knight was riding as a passenger. Neither of them could produce identification or driver's license. There were two pistols and a carbine in the car. Three cars were driven to the police station. Officers Kean and Shirley in the lead car and Sergeant Pack, a Fort Payne policeman in the police car behind the Dodge Dart driven by the defendant. Upon reaching the police station, the defendant got out and walked over to the side of Sergeant Pack's car and talked with him through the window. Defendant then ran back to the West car and drove away. The car was found abandoned some two or three hours later.

"Sergeant Pack was also indicted for the robbery

of Wendell West. He testified he had never seen defendant prior to the trial. He testified Mr. Clyde Traylor, representing the State, had promised him a "clean bill of health" if he would identify the defendant, Donald Sparks, as the driver of the West Automobile.

"Donald Sparks testified as a witness in his own behalf that he was not in Fort Payne on the evening of June 27, 1966, or the early morning of June 28; that he was in Sapulpa, Oklahoma; that he had never entered the West home or driven the Dodge Dart.

"The defendant sought to establish an alibi through the testimony of Mr. Jesse Henson, owner and manager of a motel in Sapulpa, who testified Donald Sparks was registered in his motel from June 26 to June 29, 1966. He identified defendant as the person who registered and that he was present on each of the three nights.

"Mr. Clyde Traylor, for the State in rebuttal, stated he had never made a promise to Sergeant Pack pertaining to Pack's identification of defendant." *(Sparks v. State,* 242 So. 2d 403, 405).

The jury returned a verdict of guilty and a sentence of ten years imprisonment in the penitentiary (R. p. 234). Appellant was adjudged guilty and sentenced in accord with the verdict on September 3, 1968 (R. p. 235).

An appeal to the Court of Criminal Appeals of Alabama resulted in affirmance. *Sparks v. State,* 46 Ala. App.———, 242 So. 2d 403 (1970). It is this judgment of affirmance that petitioner now seeks to have this Honorable Court review.

VI

SUMMARY OF THE ARGUMENT

A state does not deprive a criminal defendant of due process by failing to subpoena witnesses for such defendant, where this failure is the result of the defendant's failure to provide state officials with information on the location of the witnesses.

Since the judicial power of state courts is limited by state boundaries, such courts are unable to compel persons who are beyond state boundaries to attend sessions of court.

Where a state provides criminal defendants with lawful procedures for obtaining the evidence of persons who are without such state, it does not deprive these defendants of due process of law by failing to subpoena such persons, since they are beyond the jurisdiction of the state.

A statute which provides for subpoenaing witnesses from without a state to attend the courts of the state is unconstitutional in that it denies such witnesses due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

The Uniform Act To Secure The Attendance Of Witnesses From Without A State In Criminal Proceedings (which will be referred to hereinafter as "the Uniform Act") is unconstitutional in that it deprives indigent criminal defendants of equal protection of the laws and due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

VII

ARGUMENT

Petitioner seeks the ultimate reversal of his conviction for this brutal robbery on the ground that he was denied due process of law by being put to trial without two of his witnesses. He claims that the State of Alabama did not exercise diligence in locating these witnesses. Petitioner also asserts that Alabama should have a statutory proceeding for compelling the attendance at court of witnesses who are outside of Alabama. Specifically, petitioner recommends the Uniform Act. (See Appendix A, page A-1) Respondent will answer each of these arguments in turn.

A

On the day of his trial, after the jury had been struck, petitioner moved for a continuance on the grounds that two of his witnesses, William K. Knight and Ida Bell Wilson, were absent from court.

Subpoena had been issued for these witnesses, but the sheriff had not been informed of the location of Mr. Knight and Mrs. Wilson. His investigation indicated that they were both outside of Alabama.

Petitioner proved in support of his motion for continuance that an automobile had been registered in Mr. Knight's name and that a Fort Payne address was listed for him. There was no proof that Mr. Knight could actually be found at this address but it was proven that this address was the residence of one Noles.

In support of his motion for continuance, petitioner also proved that Mrs. Wilson had passed through Fort Payne,

but it was apparent that the sheriff did not know this.

It is clear then that the sheriff made a diligent effort to serve these subpoenas, but was unable to do so, because he did not have sufficient information. If petitioner knew where and when these persons could be served with subpoena, it was his duty to inform the sheriff. It was not the sheriff who failed in diligence here but petitioner.

Of course, it is apparently conceded by petitioner that these witnesses were outside of Alabama, at the time the sheriff was seeking them. This being the case, they were beyond the judicial power of the Circuit Court of DeKalb County. A letter from petitioner to these witnesses asking them to come to Alabama to testify in his behalf would have been equally effective as a subpoena issued by the Circuit Court and served on them by the Sheriff of DeKalb County. Respondent cannot be accused of failing to do what it had no legal right or power to do. See *Minder v. Georgia*, 183 U.S. 559, 46 L. Ed 328, 22 S. Ct. 224 (1901).

Petitioner was not without remedy under Alabama law. Witnesses in criminal cases who are beyond the judicial power of the State of Alabama, may be deposed and these depositions are read into evidence at the trial of the case. See Title 15, Section 297 and 300 of the 1940 Code of Alabama (recomp. 1958). (Appendix B, page A-6). However, petitioner took no advantage of these statutes.

When petitioner found that his witnesses were unavailable, he could have made a showing for them or entered stipulations. These would have required the consent of the prosecutor, but they should have been explored by petitioner.

There can be no doubt that the state must provide compulsory process to an accused person so that he can compel

the presence of witnesses in his behalf at his trial. *Washington v. Texas*, 388 U.S. 14, 18 L. Ed 2d 1019, 87 S. Ct. 1920 (1967). However, it is equally clear that the state is not required to do the impossible. *Minder v. Georgia*, supra.

The ruling of which the petitioner seeks review is the denial of a continuance by his trial judge. The granting and denying of continuances is universally recognized to be within the discretion of the trial court. 17 Am Jur, 2d Continuance, Section 3. Clearly, in the light of petitioner's failure to show when these witnesses would be available and what they would testify, the trial judge did not abuse his discretion in denying continuance. The offer of tape recorded statements by these witnesses at the trial on the merits was clearly improper and could not affect the earlier denial of continuance. The adverse ruling on petitioner's motion for continuance was especially proper when it is considered that it was based on matters which were known to petitioner before the day of the trial, yet petitioner delayed until the very moment of the evidentiary phase of his trial to make his motion. A motion for continuance which is tardily made is properly denied *Spadoni, v. Maggenti* 121 Cal. App. 147, 8 P. 2d 874 (1932), *Tiffin v. Cummings*, 144 Cal. 612, 78 P. 23 (1904).

B

Petitioner asserts that he was denied due process of law by Alabama's failure to have a statutory process for subpoenaing witnesses from without Alabama.

It is axiomatic that a state has no authority beyond its own borders, and it is equally axiomatic that a state may not ordinarily compel a person within its borders to leave the state. Yet, under the procedures urged by petitioner, a per-

son could be removed from one state and brought to another against his will.

It could be argued that what petitioner urges is similar extradition proceedings and "long arm" statutes. But this is not the case. When a person commits a crime, he knows that he could be extradited to the state of the crime from any state to which he might flee. A person who drives an automobile, does business, etc. in a state knows or should know, that by doing so he is conferring jurisdiction on the courts of that state in any suit growing out of his activity.

Under the procedure urged by petitioner, however, a person who might never have been in a state, could be removed to that state. He would be separated from his home, family, and work, not because he committed a crime or is even accused of one but because he might have some information relevant to a criminal prosecution. He would be compelled to leave his home state which would have no jurisdiction over the cause and to enter a foreign state which would have have no jurisdiction over him, and to do this he might have to pass through states which would have jurisdiction over neither the cause nor him.

The Fourteenth Amendment to the United States Constitution protects the precious right of innocent Citizens to remain at liberty. It is difficult to invision a more flagrant violation of this right than that of jurisdictionless courts seizing innocent people and transporting them to other states.

For this reason the procedure urged by petitioner is unconstitutional. See *In re Allen* 49 D & C 631 (Penn, 1940)

C

Petitioner recommends that the State of Alabama be

compelled to pass the Uniform Act (Appendix A, p.A-1).

This statute was drafted and recommended to the states by the National Conference of Commissioners on uniform state laws in 1936, and provides for compelling the attendance of witnesses in the courts of a foreign jurisdiction.

While the purposes of this statute are praiseworthy, the statute is unconstitutional for the reasons set out under "B", above.

It should also be noted that under the Uniform Act, the witness is compensated for his travel by the amount of ten cents per mile and for his separation from his home, family and work by payment to him of five dollars per day. See Section 3 of the Uniform Act. (Appendix A, page A-3). Even a day laborer who receives the minimum wage would suffer a great loss if he were subpoenaed under the Uniform Act. The Uniform Act, therefore, not only deprives persons of their liberty as pointed out in "B", above, but also deprives wage earners of their wages.

But there is another reason that the Uniform Act is unconstitutional.

It has been universally held that criminal defendants seeking to subpoena witnesses under the Uniform Act must pay the witnesses' expenses themselves. See *Olsen v. State,* ———*Minn.* ———, 177 N. W. 2d 424 (1970); *State v. Brount,* 200 Or. 35, 264 P. 2d 419, 44 A.L.R. 2d 711 (1953), U.S. Cert. Den. 347 U.S. 962, 98 L. 1105, 74 S. Ct. 711; *State v. Fourquette,* 67 Nev. 505, 221 P. 2d 404 (1950), U.S. Cert. Dent. 341 U.S. 932, 95 L. Ed 1361, 71 S. Ct. 799. There is no provision under the Uniform Act for payment by the public of the expenses of witnesses subpoenaed by indigent crimi-

nal defendants. See *State v. Hemmenway*, 80 S.D. 153, 120 N.W. 2d 561 (1963).

For this reason the Uniform Act discriminates against indigent people who are accused of crimes. In doing so the Uniform Act violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. And, since the prosecution can compel the attendance of witnesses from outside a state to appear against an indigent criminal defendant, while he cannot obtain such witnesses in his own behalf, the Uniform Act violates the due process requirement of the Fourteenth Amendment of our Constitution.

VII

CONCLUSION

It is, therefore, apparent that the State of Alabama made diligent efforts to subpoena petitioner's witnesses and that it has provided criminal defendants with procedures for obtaining and presenting the evidence of witnesses in their behalf who are beyond the jurisdiction of Alabama. It is also apparent that petitioner did not take advantage of any of these procedures.

Surely, the State of Alabama can not be condemned for failing to "skate unto constitutional thin ice" by passing statutes such as are urged by petitioner.

For all of the foregoing reasons, respondent submits that petitioner was properly convicted and that none of his

constitutional rights were violated. And, therefore, the writ of certiorari prayed for in this cause should be denied.

Respectfully submitted,

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APPENDIX A

HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEDINGS OF THE FORTY-SIXTH ANNUAL CONFERENCE, PAGES 335-338

UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHOUT A STATE IN CRIMINAL PROCEEDINGS

(This is a revision, approved and adopted in 1936 at the Forty-sixth Annual Conference held in Boston, Massachusetts, of the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases.)

Be it enacted, etc. (Use the proper enacting clause for the State.)

Section 1. *Definitions.* "Witness" as used in this act shall include a person whose testimony is desired in any proceeding or investigation by a Grand Jury or in a criminal Action, Prosecution or Proceeding.

The word "State" shall include any territory of the United States and the District of Columbia.

The word "summons" shall include a subpoena, order or other notice requiring the appearance of a witness.

Section 2. *Summoning Witness in this State to Testify in another State.* If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testitfy in this state certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a ma-

terial witness in such prosecution, or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.

If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence, (and of any other state through which the witness may be required to pass by ordinary course of travel), will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing the certificate shall be *prima facie* evidence of all of the facts stated therein.

If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be *prima faci* proof of such desirability may, in lieu of issuing subpoena or summons, order that said witness be forth-

with taken into custody and delivered to an officer of the Requesting state.

If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of 10 cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and five dollar for each day, that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

Section 3. *Witness from Another State Summoned to Testify in This State.* If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If the witness is summoned to attend and testify in this state he shall be tendered the sum of 10 cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and five dol-

lars for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court record in this state.

Section 4. *Exemption from Arrest and Service of Process.* If a person comes into this state in obedience to a summons directing him to attend and testify in this state he shall not while in this state pursuant to such summons be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state, under the summons.

If a person passes through this state while going to another state in obedience to a summons to attend and testify in that state or while returning therefrom, he shall not while so passing through this state be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

Section 5. *Uniformity of Interpretation.* This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it.

Section 6. *Short Title.* This act may be cited as "Uniform Act to Secure the Attendance of Witness from Without a State in Criminal Proceedings."

Section 7. *Repeal.* All acts or parts of acts inconsistent with this act are hereby repealed.

Section 8. *Constitutionality.* If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be servable.

Section 9. *Time of Taking Effect.* This act shall take effect . . . . . .

APPENDIX B

CODE OF ALABAMA 1940 (RECOMPILED 1958) TITLE 15

§ 297. Depositions in criminal cases; when taken by defendant.—The defendant may take the deposition of any witness, who, from age, infirmity, or sickness, is unable to attend court; or who resides out of the state, or more than one hundred miles from the place of trial, computing by the route usually traveled; or who is absent from the state; or where the defense, or a material part thereof, depends exclusively on the testimony of the witness.

* * * * *

§ 300. Taken as in civil cases; when not read.—Depositions taken under the provisions of the three preceding sections are governed by the same rules which are applicable to depositions taken in civil cases at law; and no such deposition can be read in evidence on the trial, if it appear that the witness is alive, and able to attend court, and within its jurisdiction.

CERTIFICATE OF SERVICE

I, David W. Clark, one of the attorneys for the Respondent and a member of the Bar of the Supreme Court of the United States, and I, Joseph G. L. Marston, III, one of the attorneys for the respondent, hereby certify that on this ————day of ————, 1971, we did serve the requisite copies of the foregoing Brief and Argument of Respondent and Appendices on the Honorable Fred Blanton, Jr., whose address is Twenty-One Twenty-One Building, Suite 1627, Birmingham, Alabama, 35203, and The Honorable Loma B. Beaty, whose address if Fort Payne, Alabama, 35967, Attorneys for Petitioner, by mailing said copies to them at the aforesaid addresses with with postage prepaid.

DAVID W. CLARK
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